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In The

Supreme Court of the United States

OCTOBER TERM, 1969

NO. 1608

L. L. McGUIRE,

Petitioner,

v.

JOHN F. BAKER, et al,

Respondents.

Brief of Respondents, John F. Baker, Bryant Williams, Independent Executor of the Estate of M. D. Bryant, Deceased, and Trustee of the Bryant Family Trust; and Mrs. Ethel C. Bryant in Opposition to Petition for Writ of Certiorari

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ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

OPINIONS BELOW

Reference to the opinions of the District Court and Court of Appeals is adequately made in the Petition.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

QUESTION PRESENTED

Whether Petitioner's cause of action was barred by Article 5526, Vernon's Annotated Texas Statutes (the Texas Two-Year Statute of Limitations) as held by the District Court and affirmed by the Court of Appeals.

STATEMENT OF THE CASE

The facts of the cases are stated fully in the opinions of the District Court (Petitioner's Appendix A-1 to A-9) and the Court of Appeals (Petitioner's Appendix A-10 to A-13).

In order to set forth in more detail some of the pertinent facts indicating the extent of Petitioner's knowledge and understanding of his possible cause of action, the length of time he had such knowledge and understanding and the fact that any delay in filing suit was for Petitioner's convenience, we take the liberty of making the following additions to the statements of the District Court and Court of Appeals referred to above.

As has been stated in said opinions, Petitioner brought a first suit involving this entire transaction in the United States District Court for the Western District of Texas, Austin Division, which was Cause No. 1313, styled L. L. McGuire v. Jerry Sadler, et al, and this suit will be referred to herein as the "Austin Case".

In paragraphs 18 through 21 of his First Amended Complaint dated December 22, 1962, in the Austin Case, Petitioner alleges a conspiracy on the part of Bryant and the other Respondents herein, including Gulf Oil Corporation

and its employees, although not parties thereto, to deprive him of his lands; to build spurious monuments; to move survey lines; and to make fraudulent surveys (Court of Appeals Appendix, p. 53). In almost identical language, in paragraphs 13 through 15 of his First Amended Complaint filed herein, Petitioner alleges the same conspiracy against the same persons, the Respondents herein. (Unprinted Record, Petitioner's First Amended Complaint, pp. 6-7)

In paragraph 24 of his First Amended Complaint in the Austin Case, Petitioner alleged he knew of the dishonest survey on December 16, 1961. (Court of Appeals Appendix p. 24) The same allegation appears in paragraph 19 of Petitioner's First Amended Complaint herein (Unprinted Record, Petitioner's First Amended Complaint p. 9).

Again, paragraphs 30 and 31 of Petitioner's First Amended Complaint in the Austin Case (Court of Appeals Appendix p. 30) and paragraphs 25 and 26 of his First Amended Complaint herein (Court of Appeals Appendix p. 10) almost identically allege that the reports of Surveyor Thompson and the plats were dishonest and fraudulent and that the monuments used by him were built by Respondents, Bryant, Baker and Gulf Oil Corporation.

And again in paragraphs 55 through 59 of his First Amended Complaint in the Austin Case, Petitioner alleged the conspiracy among all Appellees to fraudulently and dishonestly deprive him of his lands (Court of Appeals Appendix pp. 65-66).

At the hearing on Respondents' various motions to dismiss and for summary judgment, in response to the District Court's inquiry as to why he did not include his claim for damages in the Austin Case, Petitioner made the following judicial admission, to-wit:

> "Your Honor, that brings up the awfully involved question of when this cause of action accrued. When the Plaintiff filed this suit in Austin, I think it was October 1, 1962, the land had not been patented to Mr. Bryant. That suit was a suit for an injunction to prevent him from selling the land. Well, now, the Court did not dismiss that suit in Austin until June 19, 1963, about nine month later. Then several days later, Mr. Sadler sold the land to Mr. Bryant. *Then the Plaintiff could not sue for damages accrued. But the Plaintiff could not sue for damages until the damage was done: The damage was — the Plaintiff knew as early as October of '61 — I mean December of '61, that they were making a dishonest survey out there. The plaintiff did not know the land of the plaintiff would be taken until it was.* The Land Commissioner held up on awarding the land and selling it to Mr. Bryant until the district court in Austin in 1963 dismissed the plaintiff's case. If the case had been tried, there is a good possibility the Land Commissioner would not have, and I think he would have never sold it to Mr. Bryant, but as soon as the district court dismissed the case, I guess he felt the plaintiff wouldn't go on with it and he was mistaken." (Court of Appeals App. p. 98) (emphasis ours).

Judge Brewster, a little later, again inquired as to why Petitioner didn't sue for damages in the earlier Austin suit and the following exchange took place:

> THE COURT: "You knew you could have brought them in and made them parties to that suit and you could have asked for damages if you had wanted to?"

MR. McGUIRE: "Well, I hadn't — I could have asked but I just didn't feel —"

THE COURT: " — You didn't think it was the judicious thing to do?"

MR. McGUIRE: "Well, how would I know that the Court would hold with me? In fact, there was a good chance that this case — that I would have lost the case down there and I didn't feel that the — the case was all very, very complicated and I didn't want to make it any worse at that time until I knew that the court would decide that the patents to Mr. Bryant should be cancelled." (Court of Appeals Appendix p. 99).

The essence of Petitioner's cause of action, as stated in paragraphs 1 and 2 of his First Amended Complaint herein is a suit for monetary damages under the Civil Rights Act, 42 USCA Sections 1983 and 1985 (2), (3). Article 1, Section 10 and the 14th Amendment to the U. S. Constitution (Court of Appeals Appendix pp. 2 & 3); and Petitioner made demand for a jury (Court of Appeals Appendix p. 17).

There is no diversity of citizenship, and of necessity to Federal jurisdiction, Petitioner must base his claim upon his alleged violation of Federal rights giving rise to a Federal question.

ARGUMENT

1. The Courts Below Were Consistent with the Decisions of This Court and the Circuits in Borrowing and Applying Texas Limitations Statutes.

It is axiomatic that when, as here, Congress has provided no period of limitation for the enforcement of a federal claim or right, the Federal Courts must borrow the applicable limitations statute from the state in which it sits. *O'Sullivan v. Felix*, 233 U.S. 318, 58 L. Ed. 98 (1918);

Beard v. Stephens, 372 F. 2d 685 (5th Cir. 1967); *Moviecolor Ltd. v. Eastman Kodak Co.*, 288 F. 2d 80 (2nd Cir. 1961), cert. den. 368 U.S. 821, 7 L. Ed. 2d 26. In this borrowing process, the Federal Court must, first, determine the essential nature of the claim from the available Federal law; secondly, it must look to, and follow, the state law in determining which state statute of limitation is applicable to claims having that same nature. *McClaine v. Rankin*, 197 U.S. 154, 49 L. Ed. 702 (1905); *Beard v. Stephens*, supra; *Moviecolor Ltd. v. Eastman Kodak Co.*, supra; *Smith v. Cremins*, 308 F. 2d 187 (9th Cir. 1962); 98 ALR 2d 1160, at 1162-1165.

There being no federal statute of limitation applicable to suits under the Civil Rights Act many of the circuit courts have held that the statutes of limitations of the states within which the federal courts are sitting are applicable to suits for damages based on violation of the particular sections of Civil Rights Act involved here. *Beard v. Stephens*, supra, (5th Cir. 1967); *Hileman v. Knable*, 391 F. 2d 596 (3rd Cir. 1968); *Swan v. Board of Higher Education*, 319 F. 2d 56 (2nd Cir. 1962); *Mohler v. Miller*, 235 F. 2d 153, (6th Cir. 1956); *Smith v. Cremins*, supra, (9th Cir. 1962); *Jackson v. Duke*, 259 F. 2d 3, (5th Cir. 1958); also, cases cited in 90 ALR 2d 265 and 98 ALR 2d 1160. No court of appeals has held to the contrary.

2. Holding of the Courts Below as to Nature of This Suit Does Not Conflict.

The District Court and Court of Appeals holding that the nature of Petitioner's suit is either (a) a suit for dam-

ages based on liability created by statute, to-wit, the Civil Rights Act, 42 USC § 1983 and 42 USC § 1985, or (b) a suit for damages to an interest in real estate does not conflict with any decision of this Court or of any of the circuit courts and is proper.

Almost invariably federal courts have determined that suits for damages under the Civil Rights Act are in the nature of suits based on "liability created by statute" where such a provision is included in the limitation laws of the states in which they sit. *Lamber v. Conrad*, 308 F. 2d 571 (9th Cir. 1962); *Smith v. Cremins*, supra; *Swan v. Board of Higher Education*, supra, *Fischman v. Raytheon Mfg. Co.*, 188 F. 2d 783 (2nd Cir. 1951); *Suckow Borax Mines Consol., Inc. v. Borax Consol. Ltd.*, 185 F. 2d 196 (9th Cir. 1950); *Bomar v. Keyes*, 162 F. 2d 136 (2nd Cir. 1947); *Culver v. Bell & Loffland, Inc.* 146 F. 2d 29 (9th Cir. 1944); *Donald v. Bird*, 85 F. 2d 663 (9th Cir. 1936); See also, cases cited in 98 ALR 2d 1160;

Petitioner says his is a suit arising under Article 1, Sec. 10 and the 14th Amendment of the Constitution, or that he would have an action at common law regardless of the Civil Rights Act, and that therefore his action is not based on liability created by statute. See Petition p. 11.

However, the precise purpose of the Civil Rights Act was to provide a remedy in damages for violation of the federal Constitution and laws and without the Civil Rights Act he would have no such federal remedy. The fact that the suit arises under the Constitution does not change the fact that it is a suit for damages under the Civil Rights Act for viola-

tion of a right or immunity under the Constitution a federal law. As a matter of fact, a brief look at the cases reveal that most all of the suits for relief under the Civil Rights Act are based on violation of the "due process" and "equal protection" clauses of the 14th Amendment.

Also, there being no diversity of citizenship here, the jurisdiction of the Federal Court is based solely on allegations of a cause of action under the Civil Rights Act, 42 USC §§ 1983 and 1985. If Petitioner's only remedy was in damages under some common law theory, without involving a violation of the Civil Rights Act, the Federal Court would have no jurisdiction.

Petitioner at page 11 of his petition cites *Smith v. Cremins*, supra, for the proposition that since he may have had a cause of action at common law which would exist in the absence of the Civil Rights Act, his action is not based on "liability created by statute." He relies on a statement of the Court as follows, "an action is not based 'upon a liability created by statute' if the right is one which would exist at common law in the absence of statute," 308 F. 2d at p. 189. However, this quote is only a portion of a sentence in which the Court was quoting California law and is cited out of context. Actually, *Smith v. Cremins* held that a suit under the Civil Rights Act can not be an action which would exist at common law in absence of statute but must be in the nature of a suit based on "liability created by statute."

In so holding the Ninth Circuit explained that this as well as other suits brought under the Civil Rights Act must be considered suits based on "liability created by statute," as follows:

> "The California courts have held that an action is based "upon a liability created by statute," within the meaning of Section 338(1), if the liability would not exist but for statute. Or, conversely, an action is not based "upon a liability created by statute" if the right is one which would exist at common law in the absence of statute. Though broadly stated, the distinction drawn is sufficiently discriminating for the present case.
>
> "Section 1983 of the Civil Rights Act clearly creates rights and imposes obligations different from any which would exist at common law in the absence of statute. A given state of facts may of course give rise to a cause of action in common-law tort as well as to a cause of action under Section 1983, but the elements of the two are not the same. The elements of an action under Section 1983 are (1) the denial under color of state law (2) of a right secured by the Constitution and laws of the United States. Neither of these elements would be required to make out a cause of action in common-law tort; both might be present without creating common-law tort liability." 308 F. 2d at 189-190.

The Court in *Smith v. Cremins*, added the following sound reason for holding that suits for damages under the Civil Rights Act are suits based on "liability created by statute." This reason is that in fact the cause of action is a statutory cause of action created by Congress in the Civil Rights Act. Inconsistency and confusion would result if the single cause of action created by Congress were fragmented in accordance with analogies drawn to rights created by state law,

and the several differing periods of limitation applicable to each state created right were applied to the single federal cause of action.

Decisions of federal courts sitting in states which have no such expressed provision in their limitation statutes for suits based on "liability created by statute" nevertheless consistently classify the nature of suits brought under the Civil Rights Act as suits based on "liability created by statute," and then look to the state case law to see which provision of the state limitation laws is applicable to a suit of such nature. See *Mohler v. Miller*, supra; *Wakat v. Harlib*, 253 F. 2d 59 (7th Cir. 1958).

Again Petitioner states at page 18 of his petition that the holding of the courts below conflicts with *Wakat v. Harlib*. Petitioner says that in *Wakat* the Seventh Circuit held that since there was no expressed "liability created by statute" provision in the Illinois limitation law, the court would apply the limitation law provision applicable to "every action for which no limitation is otherwise provided." This is not a correct statement of that decision. That decision held that the suit for damages under the Civil Rights Act was a suit based on "liability created by statute." Then the Court reviewed and expressly relied on Illinois' decisions in determining which provision of the limitation law to apply. This is exactly what the District Court and the Fifth Circuit did here. They determined this suit to be in the nature of a suit based on "liability created by

statute," then looked to and followed Texas court decisions holding suits of such are governed by the two year statute of limitations applicable.

Consistency and uniformity result when the nature of the causes of action under the Civil Rights Act are standardized as suits based on "liability created by statute." In fact, as stated above, almost invariably federal courts find this to be the nature of such suits. The holding of the courts below is consistent with those decisions.

Alternatively, the courts below held that Petitioners suit is in the nature of a suit for damages for trespass on or injury to land or an interest therein. Petitioner by use of semantics, attempts to make his suit one for "taking" not "damage" or "injury" to land and says his claims is like that of claimants in *U. S. v. Dickinson*, 331 U.S. 745, 91 L. Ed. 1789 (1947) and a Texas case, *Brazos River Authority v. City of Graham*, 163 Tex. 167, 354 S.W. 2d 99 (1961). Those cases are not of the same nature as the case at bar; they are condemnation suits, direct or inversely, for compensation for land lawfully taken by a legally empowered sovereign authority. It is elementary that in condemnation cases there is a lawful permanent appropriation of an interest in property for a public use, and after compensation for such is paid the claimant, the authority taking same becomes and remains the owner of the interest in property appropriated by it.

On the other hand in this case, any entry on, use of or taking of benefits from the land was not a taking, but

was a consequence of Bryant's trespass thereon which was terminated by Petitioner in his first suit; there is no appropriation for a public use; none of the Respondents had any sovereign capacity or authority on which to base an appropriation for a public use, as none of the Respondents have such condemnation powers (not even Respondent Sadler, in his capacity and where not for public use); and, none of the Respondents obtained any permanent interest in any property for which Petitioner is entitled to compensation because a property interest was "taken" from him. No, Petitioners' suit is in the nature of a suit for redress for consequential damages to real estate resulting from the acts of a trespasser as the courts below correctly so found. See, *Humble Oil & Refining Co. v. Kishi*, 276 S.W. 190 (Texas 1927); *Gulf Refining Co. v. Mabey*, 134 S.W. 2d 843 (Tex. Civ. App. 1940); *Gulf Oil Corp. v. Alexander*, 291 S.W. 2d 792, 295 S.W. 2d 90 (Tex. Civ. App. 1956, error ref'd n.r.e.); and *Kirby v. Hayden*, 125 S.W. 993 (Tex. Civ. App. 1910).

3. Holding of Courts Below that the Texas Two Year Limitation Statute is applicable to Bar Petitioner's Action Does not Conflict.

Under *O'Sullivan v. Felix*, supra, *Board v. Stevens*, supra, *Moviecolor Ltd. v. Eastman Kodak Co.*, supra, and *Smith v. Cremins*, once the District Court (and the Court of Appeals or review) determined the nature of Petitioners suit, it was bound to, and did, look to and follow the state law in determining which provision of the state limitation law applied to suits of such nature. The courts below were following *O'Sullivan* not holding in conflict therewith as Petitioner says.

Under Texas law the Texas two year Statute of Limitation is applicable to suits based on "liability created by statute" or suits for damages or injury to land or an interest therein.

Article 5526, VATS prescribes a two-year limitation period on the following types of actions:

(1) "Actions of trespass for injury done to the estate or property of another." Article 5526 VATS, Section 1.

(2) "Actions for debt where the indebtedness is not evidenced by a contract in writing." Article 5526 VATS, Section 4.

Although the Texas limitation statute has no express provision applicable to suits based on "liability created by statute, nevertheless, it is well established by numerous state and federal decisions that a suit based on "liability created by statute" is an action for debt not evidenced by a contract in writing and is governed by the Section 4 of the two year statute. *Rose v. First State Bank*, 59 S.W. 2d 810 (Tex. 1953); *Cowart v. Russell*, 144 S.W. 2d 249 (Tex. 1940); *Payne v. Tyler*, 379 S.W. 2d 373 (Tex. Civ. App. 1964, writ ref'd., n.r.e.); *Shaw v. Burk*, 61 S.W. 2d 526 (Tex. Civ. App. 1933, writ ref'd.); *Hollingsworth v. Cities Service Oil Co.*, 199 S.W. 2d 266 (Tex. Civ. App. 1947, writ ref'd.), cert. denied 322 U.S. 744; *Port Arthur v. Tillman*, 382 S.W. 2d 138 (Tex. Civ. App. 1966) reversed on other grounds, 398 S.W. 2d 750 (Tex. 1965); *Uhler v. Todd Houston Ship Building Corp*, 198 2d 631 (Tex. Civ. App. 1946, no writ

history). See *Hamilton v. Board of Fireman's Relief and Retirement Fund Trustees*, 408 S.W. 2d 781 (Tex. Civ. App. 1966, n.r.e.)

If it is considered that Petitioners cause has some quasi-common-law basis, it still is considered to be one for debt or on account and barred by the two year statute. *Ferguson v. Ferguson*, 181 S.W. 2d 601 (Tex. Civ. App. 1944, writ ref. w.o.m.); *Zarnba v. Boethel*, 393 S.W. 2d 716 (Tex. Civ. App. 1965); *Clanton v. Community Finance & Thrift Corp.*, 262 S.W. 2d 252 (Tex. Civ, App. 1953).

In *Russell v. Starkeys*, 286 F. 2d 786 (5th Cir. 1961), the Fifth Circuit has construed said Section 4 of Article 5526 very broadly to cover all types of claims giving rise to an obligation to repay, whether such obligation be express or implied.

We are able to find only one case in which a federal court was considering the applicability of the Texas limitation statute to a suit under the Civil Rights Act and that was *Jackson v. Duke*, supra. In that case the Fifth Circuit held that the sections of the two year statute Article 5526 VATS dealing with suits for conversion of personal property and suits for personal injuries applied to a suit under the Civil Rights Act for damages from assault by a police officer. No cases were cited and the possible applicability of some other limitation statute was not discussed.

However, in analagous situations involving suits under similar federal statutes providing for recovery of money damages, the federal courts in Texas have constructed such

actions to be causes of action upon a "debt" and upon statutory liability, governed by the two year statute of limitation. *Green v. Wilkinson*, 135 F. Supp. 309 (ND Tex. 1955) aff'd 234 F. 2d 120 (5th Cir. 1956) (a suit for damages under Federal Anti-Trust law). *Klotz v. Ippolito*, 40 F. Supp. 422 (SD Tex. 1941) (suit in FLSA); *Owen v. Liquid Carbonic Corp.*, 42 F. Supp. 744 (SD Tex. 1941); *Duncan v. Montgomery Ward & Co., Inc.*, 42 F. Supp. 879 (SD Tex. 1941); *Hollingsworth v. Cities Service Oil Co.*, supra.

It is evident that the Texas courts have determined that Section 4 of the Limitation Statute are applicable to suits based on "liability created by statute" and that the federal courts have so found that to be the Texas law.

The courts have uniformly held that actions for damages or injuries to real estate are governed by Section 1 of the same two year statute. See, *Tennessee Gas Transmission Co. v. Fromme*, 269 S.W. 2d 336 (Tex. 1954); *Gulf Oil Corp. v. Alexander*, 291 S.W. 2d 792 (Tex. Civ. App. 1956, writ ref'd, n.r.e.); *Gulf Oil Corp. v. Nabers*, 134 S.W. 2d 843 (Tex. Civ. App. 1939 n.w.h.); *Tietze v. International & G. N. R. Co.*, 80 S.W. 124 (Tex. Civ. App. 1904).

4. Holding of Courts Below That Petitioner's Cause Accrued June 24, 1963, Was Correct and Does Not Confliet.

Under Article 5526 VATS, the limitation period begins to run on the date a cause of action "accrued." The Courts below held Petitioners cause accrued on June 24, 1963, the date the state sold the land claimed by Petitioner and issued patents thereto to Respondent Bryant.

The oft stated rule applicable in determining when a cause of action accrues in the absence of fraudulent concealment is stated by the Supreme Court of Texas as follows:

> "When an act is in itself lawful as to the person who bases an action on injuries subsequently accruing from, and consequent upon, the act, it is held that the cause of action does not accrue until the injury is substained, * * * If, however, the act of which the injury was the natural sequence was a legal injury, — by which is meant an injury giving cause of action by reason of its being an invasion of a plaintiff's right, — then, be the damage however light, limitation will run from the time the wrongful act was committed, and will bar an action for any damages resulting from the act, although these may not have been fully developed until within a period less than necessary to complete the bar." *Houston Waterworks v. Kennedy*, S.W. 36, at p. 37 (Tex. 1888).

This is the general rule. *Lyles v. Railway Co.*, 11 S.W. 782 (Tex. 1889); *Tennessee Gas Transmission Co. v. Fromme*, supra; See also, 54 C.J.S. Limitation of Actions Section 168 pp. 122-123.

Where both the fraud and the persons committing the fraud are known, or should have been known in the exercise of due diligence, this general rule applies, and a person cannot withhold suit merely for want of knowledge of or lack of ability to ascertain the full extent of the damages, Nor will the fact that actual or substantial damages do not occur until a later date postpone the running of the limitation period. *Burnham v. Todd*, 139 F. 2d 388 (5th Cir. 1944); *Atkins v. Crosland*, 417 S.W. 2d 150 (Tex. 1967);

Guinn v. Press, 140 S.W. 2d 438 (Tex. 1940); *Daniels v. Conrad*, 33 S.W. 2d 411 (Tex. Civ. App. 1959 writ ref'd, n.r.e.); *Gulf Refining Co. v. Nabers, supra, Collins v. Griffith*, 125 S.W. 2d 419 (Tex. Civ. App. 1938, error ref'd); *American Indemnity Co. v. Ernest & Ernest*, 106 S.W. 2d 763 (Tex. Civ. App. 1937, error ref'd); 54 C.J.S. Limitations of Actions Section 168, p. 123; 37 Tex. Jur. 2d Limitations of Actions Section 63, p. 184.

These cases and the Courts below are consistent with *Holmberg v. Armbrecht*, 327 U.S. 392 90 L. Ed. 743 (1946); *Moviecolor Ltd. v. Eastman Kodak Co.*, supra, and other cases applying the "federal fraudulant concealment doctrine," See 90 ALR 2d 265, at 275. The holding of the Courts below that Petitioner cannot find relief in said doctrine is consistent with such decisions because at the date they determined his cause of action accrued there was no concealment; Petitioner already had full knowledge of his cause of action, all the parties to the wrongful conspiracy as well as every element of conspiracy.

For the sake of brevity we ask the Court to refer to the statement of the case section of this brief, and to consider and to compare the different paragraphs of Petitioner's pleadings in the Austin case with the designated paragraphs in the present suit showing to the fullest extent that Petitioner had knowledge as early as December 1962 and probably December 1961, of his cause of action for damages, the conspiracy, all the alleged fraudulent acts, dishonest surveying, map making and monument moving and the identity of

all the alleged conspirators committing acts of fraud. Petitioner admitted to the District Court in this case that he knew he had a cause of action for damages as early as December 1962 and probably December 1961. (Court of Appeals App. pp. 98-99). Petitioner stated to the court, "Well, now, the court did not dismiss that suit in Austin until June 1, 1963, about nine months later. Then several days later (June 24, 1963) Mr. Sadler sold the land to Mr. Bryant. *Then the plaintiff's cause of action for damages accrued.*" (Court of Appeals App. p. 98) (emphasis ours).

5. Holdings of Courts Below Do Not Conflict with Any Case cited by Petitioner.

Petitioner claims the holding of the lower courts herein conflicts with *Trustees of Dartworth College v. Woodward*, 17 U.S. 518, 4 L. Ed. 629 (1819); *Fletcher v. Peck*, 3 L. Ed. 162 (1810); *Wood v. Lovett*, 313 U.S. 362, 85 L. Ed. 1404 (1941). *Anderson-Tully Co. v. Murphree*, 153 F. 2d 874 (8th Cir. 1946); *McGuire v. Sadler*, 337 F. 2d 902 (5th Cir. 1964). We fail to see any relationship of the issues determined in those cases to the issues in this suit. In those cases the respective courts were addressing themselves to the issue whether some state action was an impairment of private contract. There is no discussion or authoritative statement contained in any of them on the issue as to the nature of a cause of action or as to which limitation statute to apply. Any issue as to whether or not the patents issued by the State of Texas impaired any private contract of Petitioner has long been resolved in the first Austin suit, when

Respondent Bryant filed disclaimers to the lands included in his patents and the other respondents allowed judgment cancelling the patents to be entered. Thereafter, there can be no issue of any state action impairing Petitioner's contract, if in fact the patents ever did.

Petitioner at page 13 of his petition says that a different panel of the Fifth Circuit "*on the same allegations*" said in *McGuire v. Sadler* that a possible claim of impairment of contract might have been involved. Again this is not a correct statement, for the allegations in that suit stated that patents were wrongly issued to Respondent Bryant and asked for cancellation of those patents and recovery of the land. In this suit the patents have already been cancelled and the land recovered, and the remedy asked for is money damages.

Petitioner cites *Peek v. Berry*, 184 S.W. 2d 272 (Tex. 1944), in support of his contention that his suit is actually in equity and the four year limitation should apply. Unlike the case at bar, *Peek* is a case involving a suit for imposition of a constructive trust on property, recovery of the property and for recovery of damages to that trust property, and the court held that the claim for damages to the trust property being incidental to the claim for establishing the trust was includable in the suit even though the claim for damages would have been barred by the two year statute if in a separate suit.

In this case the property was regained in a prior suit and this claim for damages is not incidental to a suit the nature of which commands the application of a longer limitation

period. The recovery of the lands damaged and the cancellation of the instruments had already been accomplished. There is no claim for cancellation of any, patents and recovery of property to which Petitioner's claim for damages is incidental. Nor is there a situation giving rise to a constructive trust to which Petitioner's claim for damages is incidental. To the contrary, Petitioner expressly pleads that he is asking for impression of a trust or damages to the land, one or the other, not both, rather than asking for damages incidental to his claim for impression of a trust (Court of Appeals App. p. 15).

As a matter of law, no constructive trust can be imposed. There are several basic elements lacking.

First, there is no res. Petitioner successfully disputed Respondent Bryant's title to the vacancy lands, Bryant's right to lease, and Gulf's rights under the lease. Thus, by his own Austin suit, Petitioner established that Gulf got nothing by its lease. Had Bryant the legal authority, by agency or some other relationship, to give a lease of Petitioner's interest and had done so but did not in turn pay the consideration over to McGuire, then there would have been a situation to impress a trust on the consideration because a valid existing lease would have been obtained of his interest for which he would have been entitled to the consideration. But that is not the case here, and Petitioner, cannot, consistent with the principles governing the impression of a constructive trust, deny the existence of the lease and Gulf's rights under it and at the same time sue for and claim the consideration therefore.

Respondent Bryant did not by mistake, fraud or otherwise, receive anything from Gulf the legal title to which was theretofore owned by Petitioner, thus giving rise to the holding of such legal title by Bryant for the benefit of Petitioner. To the contrary Bryant received the lease bonus from Gulf in exchange for his execution of a lease covering his interest, whatever it might be, in certain lands (only a portion of which are involved in this dispute) on the basis of a privately negotiated lease contract. Respondent Bryant did not receive money either by mistake or deception that was intended by Gulf for Petitioner or to which he had a claim. Gulf likewise tried to negotiate a lease with Petitioner, at least to the extent that he had any semblance of title. (Court of Appeal App. pp 12 and 44).

Petitioner had no claim of ownership, equitable or legal, to the bonus Gulf was willing to pay to Respondent Bryant for a lease of his interest or claim in the lands. There was no fiduciary relationship between Bryant, or Gulf, and Petitioner, nor was there any fraud or deception involved on the part of induced Gulf to deliver to Bryant something that was owned by Petitioner. See 54 Tex. Jur. 2d 422-478, Trusts, Sections 54 et seq.

Assuming for the moment that some portion of Petitioner's claim sounds in equity, any such equitable remedy would be concurrent with, not incident to his legal claims Petitioner expressly so pleads in his amended complaint herein. (Court of Appeals App. 15). The decision of the courts below are consistant with a long line of authorities that, if

a suit is in equity the limitations statutes are controlling if equity has jurisdiction concurrent with jurisdiction to enforce a legal obligation. *Cope v. Anderson,* 331 U.S. 461, 91 L. Ed. 1607 (1947); *Godden v. Kimmell,* 99 U.S. 201, 25 L. Ed. 431 (1879); *Swan v. Board of Higher Education,* supra. Even if the suit were held to be governed by laches the Court may and usually do apply the periods prescribed by the limitation statutes. *Wagner v. Baird,* 12 L. Ed. 681 (1849). *Sullivan v. Portland & KR Co.,* 94 U.S. 806 24 L. Ed. 324 (1877) *McClaine v. Rankin,* supra, *Leonick v. Jones Laughlin Steel Corp.,* 258 F. 2d 48 (2nd Cir. 1958). See also, *Gardner v. Panama Railroad Co.,* 342 U.S. 30, 96 L. Ed. 36 (1951).

6. The Matters Involved Here Are Not of Such Importance That the Holding of the Lower Courts Should Be Reviewed.

The crux of the issues involved in this suit is the determination of the nature of the suit. As indicated above, almost every Court of Appeals has determined that a suit under the Civil Rights Act is in the nature of a suit based on "liability created by statute" as was determined in this suit. There already is uniformity on this point.

Further, the determination of the nature of a suit is a somewhat elementary judicial determination involved in every suit filed. It is reviewable as a matter of right by the circuit court. We believe that such a preliminary and elementary decision of the district court is not of such importance that the Supreme Court should occupy its time allowing every litigant a review of this determination.

Lastly, this suit in essence originated as a Texas vacancy land suit. The issues and problems involved will seldom, if ever, be presented in the federal courts again and therefore we feel this suit is not of such importance as requires review by this Court.

7. Holdings of Lower Courts Not Gross Injustice.

Petitioner being a layman representing himself, the courts in the two suits spread over seven years have been fair to him to the fullest extent of the law.

Under Rule 43 (a) Federal Rules of Civil Procedure, this Court can take judicial notice of the proceedings in the Austin suit. 2B Barron and Holtzoff, Federal Practice and Procedure 230, Section 963. In said suit Petitioner spent almost the entire six weeks testifying himself. He proffered no testimony other than his own. In need of expert evidence to rebut evidence offered by Respondent, he was allowed to qualify himself as expert and to give expert testimony with respect to surveying, petroleum engineering, geology, botany, aerial photography and hydrology, as well as acting as his own attorney. Petitioner, while stating that professional surveying, is nothing more than the application of high school trigonometry, was allowed to testify to the results of his own private surveying methods having no relationship to accepted surveying practices. The Master not only gave probative force to this "expert" testimony but gave it controlling weight over the testimony of two outstanding surveyors licensed to survey public lands in Texas.

In order to conserve space we respectfully refer you again to the State of the Case section hereof and to the parts of Petitioner's discourse with the District Judge referred to in the Court of Appeals opinion. (Petitioner's Appendix, A-16). It is evident that with full knowledge of every element of his cause of action, when it accrued and every person involved, Petitioner for his own convenience delayed filing suit on his cause. As the Court of Appeals said, "McGuire has had many opportunities to right the wrong he claims was done. But, he drove only to get his land back. The Law regards it as a case in which he slept on his claim for other relief." (Petitioner's, Appendix A-16). Certainly the entire proceedings and the result reached have not been unjust to Petitioner.

CONCLUSION

For the foregoing reasons the petition for certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have served copies of this Brief on Petitioner L. L. McGuire, and to the counsel of record for the other Respondents by depositing same in a United States post office with proper amount of first class postage prepaid, addressed to their respective post office addresses.

Curt F. Steib